



Agenda Date: 8/18/04
Agenda Item: 2D

State of New Jersey
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

IN THE MATTER OF BASIC GENERATION) ENERGY
SERVICE FOR YEAR THREE OF THE POST-)
TRANSITION PERIOD)

AND MOTION TO SEVER

IN THE MATTER OF THE OWNERSHIP OF)
RENEWABLE ENERGY CERTIFICATES ("RECS"))
UNDER THE ELECTRIC DISCOUNT AND)
ENERGY COMPETITION ACT, AS IT PERTAINS)
TO NON-UTILITY GENERATORS AND THE)
BOARD'S RENEWABLE ENERGY PORTFOLIO) DOCKET NOS: EO04040288
STANDARDS) AND EX04080879

(SERVICE LIST ATTACHED)

BY THE BOARD:

By Order dated October 1, 2003, the Federal Energy Regulatory Commission ("FERC") determined that contracts for the sale of energy by non-utility generators ("NUGs") from Qualifying Facilities ("QFs") do not automatically convey Renewable Energy Certificates ("REC") under federal law. Indeed, it appears that FERC noted that such determination would be left up to the states. Based upon the FERC decision and without ruling on the merits of the issue (*i.e.* whether the RECs would automatically flow with the sale of energy under NUG contracts), the Board of Public Utilities ("Board") issued an Order dated January 29, 2004, setting forth interim guidance with respect to the issue for the purposes of resolving certain uncertainties with respect to the February 2004 Basic Generation Service ("BGS") Auction. In that Order, the Board specifically stated that a future proceeding would be initiated for the purpose of making a definitive determination with respect to this issue. Wheelabrator Falls Inc. and Wheelabrator Gloucester L.P ("Wheelabrator") filed an appeal of that decision on or about March 11, 2004, Appellate Docket No. A-3710-03, which I remains pending.

By letter dated July 1, 2004, Wheelabrator filed a Notice of Appearance and Proposal in Docket No. EO04040288 ("BGS Year 3 case"). Among other things, Wheelabrator argued that:

- The Public Utility Regulatory Policies Act of 1978 ("PURPA") preempts the Board from ruling on this issue based upon the FERC decision dated October 1, 2003; and

- Absent a provision to the contrary, PURPA contracts do not convey RECs to a utility that purchases QF power at avoided cost.

On or about July 16, 2004, Public Service Electric and Gas Company, Jersey Central Power and Light Company, Atlantic City Electric Company d/b/a Conectiv Power Delivery and Rockland Electric Company (collectively, the “EDCs”) filed a response to Wheelabrator’s filing along with motion to sever the REC issue from the BGS Year 3 case. Among other things the EDCs argued that:

- The Board should sever the issue of REC ownership from the BGS Year 3 proceeding, since it is not integral to the auction process and could cause confusion and delay;
- Wheelabrator cannot simultaneously litigate the same issue before the Board and Appellate Division;
- Federal Law does not preempt the Board from determining which entity is entitled to RECs;
- Wheelabrator’s arguments in its July 1 filing are directly refuted by affidavits it provided to the EDCs under the Board’s Renewable Portfolio Standards (“RPS”) Regulations;
- The allocation of renewable energy purchases from the EDCs to the BGS providers is consistent with the Electric Discount and Energy Competition Act (“EDECA”) and the Board’s RPS Regulations and is necessary to prevent New Jersey ratepayers from “paying twice” for the same electricity which Wheelabrator is providing.

By letter dated August 4, 2004, Wheelabrator filed a response in opposition to the EDC’s motion to sever, arguing that the REC issue was relevant to the BGS proceeding and must be resolved prior to the next BGS Auction.

Upon review of the submissions in this matter, the Board is persuaded by the arguments of the EDCs with respect to severance and finds that is appropriate to sever the issue of REC ownership from the BGS Year 3 proceeding and to establish a separate docket, BPU Docket No. EX04080879, to consider the REC ownership issues in a timely manner, so that these issues can be resolved before the end of the year.

Accordingly, the Board is establishing a schedule for comments on the following questions:

- 1) Does the State have jurisdiction to decide the issue of the ownership of RECs? In your discussion, please consider the recent decisions in American Ref-Fuel Company, et al. (105 FERC ¶ 61, 004, October 1, 2003) and (107 FERC ¶ 61, 016, April 15, 2004- denying motions for rehearing and reaffirming earlier decision) and discuss any relevant preemption or other jurisdictional issues.
- 2) Assuming the ownership of state-created RECs is an issue to be determined by the State, is this a regulatory issue to be decided by the Board, pursuant to its Title 48 authority, or is this a contract issue to be decided by the courts?

- 3) Assuming this is a regulatory issue to be decided by the Board, what factors should the Board consider? May the Board treat contracts entered into prior to the creation of RECs differently than contracts entered into subsequent to the creation of RECs?

Commentors wishing to address the questions herein, as well as any related REC issues, should file their comments with the Board's Secretary and through the EEI list server used by the Division of Energy by September 23, 2004. Reply comments should be forwarded in a similar manner by September 30, 2004. This Order, the EDC motion, Wheelabrator reply, comments and responses will be posted on the Board's website. After review of the comments and reply comments, the matter will be returned to the Board's agenda for further action.

DATED: 8/27/04

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BY:


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ATTEST:

KRISTI IZZO
SECRETARY

"I/M/O the Ownership of Renewable Energy Certificates ("RECs") under the Electric Discount and Energy Competition Act, as it Pertains to Non-utility Generators and the Board's Renewable Energy Portfolio Standards",

Docket No EX04080879

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Docket No EX04080879

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